

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	CS Docket No. 97-80
Implementation of Section 304 of the	)	
Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and	)	PP Docket No. 00-67
Consumer Electronics Equipment	)	
	)	

**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Public Knowledge and Consumers Union (hereinafter “Consumer Groups”) hereby oppose the petitions for reconsideration filed by the Motion Picture Association of America and the National Music Publishers’ Association, *et al.* in response to the Commission’s *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 03-225 (released October 9, 2003) (“*Second Report and Order*”) in the above captioned proceeding.

**I. INTRODUCTION AND SUMMARY**

The Consumer Groups commend the Commission’s commitment to careful stewardship of the plug-and-play rulemaking and we encourage the Commission to adhere to its narrowly tailored approach, designed both to harness “marketplace forces”<sup>1</sup> and to avoid

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<sup>1</sup> In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; and Compatibility Between Cable Systems and Consumer Electronics

changing or affecting existing copyright law. Therefore, we oppose the Motion Picture Association of America, Inc. (“MPAA”) and National Music Publishers’ Association, *et al.*, (“NMPA, *et al.*”) petitions for reconsideration because they unnecessarily broaden this rulemaking and by requesting the imposition of technology mandates that will harm the marketplace and consumers.

The Consumer Groups oppose the MPAA’s request that the Commission revise the *Second Report and Order* to require implementation of selectable output control capability and to permit its use in certain circumstances.<sup>2</sup> The *Second Report and Order* took the appropriate approach by **prohibiting** the use of such controls. Furthermore, the Commission’s waiver approach permits the future implementation of selectable output control **upon a showing that such action is warranted**. The MPAA has provided no new evidence to justify this proposed change in the Commission’s ruling – a change that would lead to widespread architectural requirements and constraints on consumer devices.

The Consumer Groups also oppose the MPAA request that the Commission reclassify Subscription Video on Demand (“SVOD”) so that it may be marked as “Copy Never.”<sup>3</sup> The Commission thoroughly considered this issue and wisely chose to allow the market for SVOD to develop without the constraints of a Copy Never tier. Additionally, SVOD may become more prevalent and an attractive option for consumers in part because of the flexibility in consumer use of SVOD control the Commission has permitted. Allowing Copy Never for SVOD will stymie development of alternative distribution means and packaging and will ultimately limit consumer choice among new and competing delivery services and devices.

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Equipment, CS Docket No. 97-80, PP Docket No. 00-67, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 03-225, at ¶ 29 (October 9, 2003) [hereinafter *Second Report and Order*].

<sup>2</sup> Motion Picture Association of America, Inc., Petition for Reconsideration, CS Docket No. 97-80, PP Docket No. 00-67 (Dec. 29, 2003) [hereinafter *MPAA Petition*].

<sup>3</sup> *Id.* at 4-6.

Finally, the Consumer Groups oppose the reconsideration request of the NMPA, *et al.* for added copy controls solely designed to protect the digital audio channel. First, there is no evidence to suggest that the audio channel is uniquely subject to any redistribution threat or unauthorized copying. Furthermore, this proceeding rightly did not consider the audio channel as a separate and distinct element. A change in the Commission's regulations to solely address the audio channel would be a massive undertaking impacting new outputs and many currently unregulated devices.

## **II. THE COMMISSION SHOULD NOT MANDATE THE IMPLEMENTATION OF SELECTABLE OUTPUT CONTROL.**

Despite the Commission's reasoned decision to prohibit the use of selectable output controls,<sup>4</sup> and strong opposition to the use of selectable outputs,<sup>5</sup> the MPAA asks that the Commission mandate that selectable-output-control capability be built into plug-and-play devices.<sup>6</sup>

The Consumer Groups oppose any mandate that would force manufacturers to build devices with selectable output control. To do so would allow content owners to exert direct control over the viewing and recording rights of consumers with whom they have no contractual privity. Moreover, this control would severely limit the functionality of home electronic devices and ultimately slow and confuse the transition to digital television. Additionally, the MPAA has not provided any new evidence to suggest that selectable output control capability is needed for protection of digital television content.

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<sup>4</sup> *Second Report and Order* ¶¶ 58-61.

<sup>5</sup> *Id.* ¶ 59; *See also* the following comments in this docket: Electronic Frontier Foundation Reply Comments, 10-11; Comments of the Home Recording Rights Coalition, 6-10; Reply Comments of CEA/CERC at 10; Comcast Comments at 13-14; Comcast Reply Comments at 9; NCTA Reply Comments at 15.

<sup>6</sup> *MPAA Petition* at 2-4.

Consumer advocates, consumer electronics interests and the cable industry all supported a ban on selectable output control.<sup>7</sup> Without repeating every one of these reasoned arguments, it is worthwhile to reiterate this one simple notion; consumers expect more from digital TV, not less, and selectable output control is the worst kind of “less.”

- Selectable output control will mean less functionality for digital television and plug-and-play devices and significantly less consumer control over the content that comes into their homes than they enjoy today.
- Giving content providers the ability to use or demand the use of selectable output control, for instance in licensing agreements, will distort the marketplace by placing control of consumer device functionality in the hands of the content industry.
- Selectable output control use will result in less (and often no) ability for consumers to make legitimate personal recordings or to even predict to which output they should connect their recording devices.
- Most importantly, selectable output control will slow the transition to digital television.

As the Commission points out, “A prohibition [on the use of selectable output control] is also necessary to ensure the DTV transition is able to proceed in an expeditious manner without concerns over connectivity and functionality forestalling digital equipment acquisition.”<sup>8</sup> We agree. There is little incentive for consumers to move to more expensive digital televisions and digital plug-and-play devices if the functionality of these devices is at best unpredictable, and at its worst, reduced in comparison to analog devices.

Although the MPAA imagines scenarios in which selectable output control might be needed, these unlikely scenarios are little reason for the Commission to change its course and issue a broad mandate after thoroughly considering the issue. The MPAA first suggests that “a court, responding to intellectual property, security, or other concerns, may order the

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<sup>7</sup> See *infra* note 5.

<sup>8</sup> *Second Report and Order*, ¶ 61.

termination of a certain kind of output.”<sup>9</sup> We are not aware of any comparable court order mandating the termination of an entire array of outputs, and while surely one can imagine many possible court orders, this prospect is extremely unlikely, at best.

The second scenario which the MPAA suggests is one in which patent holders of output technologies attempt to impose licensing obligations or obtain licensing fees because the content is transmitted over their patented output.<sup>10</sup> Without the option of using selectable output control, the MPAA states that the studios and Multichannel Video Program Distributors (hereinafter “MVPDs”) would face litigation, licensing fees or alternatively have to distribute the content without protection.<sup>11</sup> Once again, we note that this scenario is at best highly unlikely. Although one can imagine a wide-range of patent claims, these imagined claims hardly justify a change in the Commission’s rule. Furthermore, the National Cable and Telecommunications Association and DirectTV do not mention any fear of this patent claim scenario in their petitions for reconsideration. If expensive licensing or litigation or licensing fees were looming, seemingly MVPDs and their representatives would express some concern – they have not.

The Commission stated that it “will consider waivers, petitions or other proposals to use selectable output control” that could lead to new business models and provide consumer benefit.<sup>12</sup> This process adequately addresses the future implementation and use of selectable output control and creates the opportunity for future Commission action, if indeed any of the MPAA’s scenarios come to pass. Ultimately, the MPAA has provided no new evidence warranting that the Commission now take the extreme step of mandating that all new plug-

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<sup>9</sup> *MPAA Petition* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Second Report and Order* ¶ 61.

and-play devices, ranging from Personal Video Recorders (hereinafter “PVRs”) to Media PCs, include selectable output control capability. This is not the time to slow the transition to DTV by creating additional demands upon consumer electronics makers and by creating greater consumer confusion and disappointment.

### **III. THE COMMISSION SHOULD NOT IMPOSE “COPY-NEVER” ON SVOD.**

The MPAA asks that the Commission allow SVOD to be marked as Copy Never.<sup>13</sup>

The Consumer Groups oppose imposing the Copy Never regime on the developing market of SVOD. The Commission properly determined that SVOD is still developing and as such, should more fully develop without the restriction of a Copy Never tier. Allowing Copy Never for SVOD will alter the market for these new delivery packages and prevent consumers from using content more flexibly. Finally, the Commission should not endorse one SVOD business model over another and anoint one SVOD format as the winner.

SVOD is still in its infancy, as the Commission states, “SVOD is a nascent service that was not contemplated by Congress when it adopted Section 1201(k) of the DMCA. We anticipate that SVOD will grow and evolve to a significant degree and that other forms of this service, including those different than that offered by Starz Encore and HBO, will emerge in the near future.”<sup>14</sup> Already, HBO and Starz Encore have two different models of SVOD, and flexible SVOD models and new delivery systems working in unison with new digital plug-and-play devices will ultimately speed the transition to DTV and encourage broader consumer acceptance of digital plug-and-play devices.

Allowing Copy Never for SVOD would change the landscape and stall the creation of new benefits and functionality associated with alternative delivery mechanisms. Although the

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<sup>13</sup> *MPAA Petition* at 4-6.

<sup>14</sup> *Second Report and Order* ¶ 74.

MPAA argues that programmers will have the option to negotiate licenses for less restrictive encoding rules, the reality is that very few content providers will consider licensing content under a Copy Once scheme if they can demand Copy Never instead. In fact, the MPAA implies that the Copy Never scheme is their preferred encoding rule merely by asking that the Commission change its decision on SVOD. The fact that some consumers will “bear” Copy Never from some SVOD providers does not mean that all SVOD should be pigeonholed into this scheme.

Ultimately, the consumer and technology development will suffer if Copy Never is permitted for SVOD. SVOD has a chance to develop as an attractive alternative to other video-on-demand content. In fact, we can envision SVOD providing consumers with an entirely new way of enjoying content. Consumers would no longer be restricted to a single viewing, viewing at a set time, or viewing content in a set time period. Instead, consumers could record and watch their SVOD content when and how they wish. For example, a person could watch the first half of a movie one night and the second half on the next night or even the next week, or, in conjunction with a PVR, parents could choose to bypass a scene they deem inappropriate for their children after they have previewed the movie in its entirety earlier in the week. These two possibilities only begin to explore the possible delivery options SVOD could offer; however, allowing Copy Never could end all of these enticing options and the new technologies they will encourage.

#### **IV. THE COMMISSION SHOULD NOT MODIFY THE PLUG AND PLAY RULES SOLELY TO ADDRESS THE AUDIO CHANNEL.**

The NMPA, *et al.* ask that the Commission modify the plug-and-play rules to address “piracy” of the digital audio channel. While, the Consumer Groups are sympathetic to the

problems of redistribution of other forms of digital music media, it is not consistent with the Commission's stated goal or the purpose of the plug-and-play proceeding to expand the scope of the regulation in this proceeding. Furthermore, there is no evidence that the digital broadcast audio channel is subject to indiscriminate redistribution.

The Commission and the Memorandum of Understanding (MOU) targeted encoding rules and compatibility rules for digital audiovisual content. Although the audio channel is a vital part of the content, the primary consideration by the Commission and the MOU was compatibility and encoding rules for audio-video content,<sup>15</sup> such as high quality content like first run television series and movies. If the NMPA, *et al.* are suggesting a new threat, they have failed to provide even a shred of evidence that digital broadcast audio content, apart from the video content, is the subject of piracy or redistribution.

Changing the scope of the plug-and-play rules is a massive undertaking, and not a simple change as the NMPA, *et al.* suggest. If, and it is highly doubtful, the digital audio stream now requires regulations to prevent it from being redistributed, the solution is not a quick or easy fix to the current rules adopted by the Commission. This undertaking would require an entirely new proposal and rounds of comments.

Specifically, the Commission would need to initiate an inquiry into encoding and compatibility rules for the digital audio channel and, more drastically, address unprotected digital audio outputs. This type of scheme, putting aside the wisdom of initiating any solution to a problem not proven to exist, is not a merely a simple "addition" of encoding rules to the *Second Report and Order*, it is an "audio plug-and-play rulemaking." Such a proceeding would impact a wide-range of outputs and devices designed solely for audio content. This

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<sup>15</sup> *Second Report and Order, passim.*



change is unwarranted by the evidence and well beyond the scope of this carefully limited proceeding.

## V. CONCLUSION

The Consumer Groups encourage the Commission to stay on the course of shepherding the DTV transition forward while balancing the concerns of consumers, content providers, MVPDs, consumer electronics makers, the IT industry and other interested parties. For the reasons stated above, we oppose each of the petitions for reconsideration that would reverse the careful and speedy transition to DTV: (1) the MPAA petition asking that the Commission mandate the inclusion of selectable output control capability in plug-and-play devices and the MPAA request that SVOD be subject to Copy Never encoding; and (2) the NMPA, *et al.*'s petitions requesting that the Commission modify the *Second Report and Order* to address the digital audio channel.

Respectfully Submitted,

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